No. 87-621

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., a California corp., et al.,

Petitioners,

vs.

FRANCISCAN CERAMICS, INC., et al.,

Respondents.

[Consolidated]
86-5822
86-5834
86-5974

REPLY TO THE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BENJAMIN GEORGE WILLIAMS, ESQ.

1550 Euclid Street
Santa Monica, California 90404
(213) 451-0404

Attorney for Petitioners
CALIFORNIA ARCHITECTURAL
BUILDING PRODUCTS, INC., et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 87-621

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., a California corp., et al,	(Consolidated) 86-5822 86-5834 86-5974
Petitioners,	
vs.	
FRANCISCAN CERAMICS, INC., et al,	
Respondents.	

REPLY TO THE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BENJAMIN GEORGE WILLIAMS, ESQ.
1550 Euclid Street
Santa Monica, CA 90404
(213) 451-0404

Attorney for Petitioners
CALIFORNIA ARCHITECTURAL
BUILDING PRODUCTS, INC., et al.

I. THE MATSUSHITA SUMMARY JUDGMENT STANDARD SHOULD NOT BE APPLIED OUTSIDE THE ANTITRUST CONTEXT.

The Tile Dealers invite this Court to consider that Franciscan's Opposition Brief barely mentions the Matsushita "economically plausible" standard and whether it should be applied in a RICO case. That Brief dwells at length on the reasons why Franciscan had to shut the plant. Franciscan's Opposition Brief, passim.

The Tile Dealers' Complaint is not based on the closure of the Franciscan plant; it is based on the wire and mail fraud Franciscan perpetrated on the Tile Dealers about how it was planning to go on doing business at least through the end of

March, 1984 when it had no such intent.

It made perfect economic sense for Franciscan to go on producing tile, and it made perfect economic sense for Franciscan to lie, via use of the United States mails and interstate telephone, to the Tile Dealers about its plans to stay in business when it had no such plans or its plans were to the contrary. The Tile Dealers do not contend that Franciscan's tile production and factory shut down are actionable under RICO. The Tile Dealers contend that Franciscan's defrauding them, via United States mail and interstate telephone system, is actionable under RICO.

But the Matsushita "economically implausible" test should never have been applied by the Ninth Circuit to a RICO case, as this Court impliedly held in

Sedima, 473 U.S. 479, 105 S.Ct. 3275 at 3286-3287. This Court's decision in Agency Holding Corporation v. Malley-Duff Assoc., 107 S.Ct. 2759 (1987), Franciscan Opposition Brief at 5, on the RICO statute of limitations only is certainly not dispositive and arguably not even relevant in light of Sedima.

This Court, in Matsushita Elec. Indus. Co. v. Zenith Radio Corporation, 106 S.Ct. 1348 (1986), lowered the threshold for summary judgment for the defendant only in the very special context of antitrust actions. Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486 (1962) had already established that "summary procedure should be used sparingly in complex antitrust litigation," 368 U.S. at 473, 82 S.Ct. at 491, so that Matsushita served merely to limit Poller.

Antitrust law lends itself to allegations of schemes which are inherently implausible, because the schemes, as alleged by the plaintiff, work to the defendant's short term disadvantage. Matsushita, for example, involved predatory pricing, which, as alleged by the plaintiff, would involve the defendant's willfully losing money in the short term by pricing its product below cost, in the hope of gaining market domination in the future.

The Tile Dealers do not allege that Franciscan ever willfully lost money. They allege that Franciscan's tile dumping scheme was profitable from its inception (please see Part II of this Reply).

Schemes which allegedly result in the defendants losing money are rare outside antitrust law. Here Franciscan's

scheme was economically sound, albeit fraudulent. Franciscan proceeded in two directions at once:

1. It went on making tile and reassuring all the Tile Dealers it would, or had a plan to, stay in business through the end of March, 1984, while,

2. It went on planning to shut down the factory if it saw fit, an alternative strategy of which it did not inform the Tile Dealers.

If the Tile Dealers had known that Franciscan was considering shutting down the factory they would have handled their businesses differently and would have avoided a large portion of their losses.

The Matsushita summary judgment standard is simply not appropriate in litigation outside the antitrust laws.

II. FRANCISCAN'S FRAUD AS ALLEGED BY THE TILE DEALERS, IS NOT INHERENTLY IMPLAUSIBLE.

Franciscan's Opposition Brief reflects a misunderstanding of the economics of minimizing losses while shutting down a plant. Minimizing losses does not require that Franciscan "surreptitiously shut down its kilns" while selling off its tile. (Brief in Opposition, p. 9.) Once a decision is made to shut down a plant, fixed costs (i.e., costs of plant and equipment) no longer have to be recovered before a profit is made, because the plant and equipment will never be replaced.

Franciscan could to sell its tile after it decided to close, or started to

plan to close, only by representing to its dealers that it had a plan to remain open or did not intend to close.

Franciscan's scheme was not inherently implausible, but rational and self-serving. Franciscan profited from selling tile, while its dealers were left with worthless inventory. The fraud, as alleged, and as revealed through discovery clearly passes the economic implausibility Matsushita test, which should not have been applied in the first place.

III. FRANCISCAN'S FAILURE TO DISTINGUISH WESTERN AUTO SUPPLY CO. FROM THE OPERATIVE FACTS OF THE FRANCISCAN FRAUD UNDERSCORES THE CONFLICT BETWEEN THE EIGHTH AND NINTH CIRCUITS.

In United Indust. Syndicate v. Western Auto Supply Co., 686 F.2d 1312 (8th Cir. 1982), it was held that a distributor's conduct calculated to create a false expectation on the part of its supplier that their long standing business relationship would continue, was sufficient to make out a case of fraud.

Franciscan's Opposition states that Western Auto is distinguishable because in that case there was evidence of an agreement to provide six months notice of termination of the business relationship. The Western Auto court found that the fraud action was sufficientto withstand a summary judgment motion "quite apart from any issue as to Western's knowledge of the 1978 oral agreement" providing for six months notice of termination. 686 F.2d at 1318. An oral contract was not necessary

for a finding of fraud.

The Eighth Circuit in Western Auto did not state that the fraud claim therein was "only" a colorable claim, as implied by the defendants in their opposition. (See Opposition Brief at p. 11). The Court simply said that the fraud claim was "colorable" in the sense of being legitimate and cognizable by the Court, without any attempt to diminish the value of that claim. See 686 F.2d at 1318.

IV. THE TILE DEALERS' SECOND AMENDED COMPLAINT SHOULD HAVE BEEN FILED.

Franciscan's Opposition Brief incorrectly characterizes the Tile Dealers' explanation of the proposed Amended Complaint. (Franciscan Opposition Brief at 13.) That Franciscan represented

it had a plan to stay open does not mean, as stated by the defendants, that Franciscan promised to remain in business "regardless of sales or other contingencies." Opposition Brief p. 13.

Even if Franciscan had no intent to close when its representations were made to the Tile Dealers, its consideration of closing made its representations to the Tile Dealers fraudulent.

The Ninth Circuit's misapprehension of the nature of the Second Amended Complaint, and its affirmance of the District Court's denial of leave to amend, does the Tile Dealers an injustice, which should be reversed by this Court.

Dated: November 25, 1987

Respectfully submitted,

BENJAMIN GEORGE WILLIAMS
Counsel for Petitioners/
Cross-Respondents